

IP 05-0084-CR 1 T/F USA v Wheeler
Magistrate Kennard P. Foster

Signed on 3/8/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,)	
)	
Plaintiff,)	
vs.)	
)	
WHEELER, JUAREZ,)	CAUSE NO. IP05-0084-CR-01-T/F
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Cause No. IP 05-84-CR-01 (T/F)
)	
JUAREZ WHEELER,)	
)	
Defendant.)	

MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION

This matter is before the undersigned U. S. Magistrate Judge pursuant to the Orders entered by the Honorable John Daniel Tinder, Judge, on October 4, 2005 and February 28, 2006, designating this Magistrate Judge to conduct hearings on the Petitions for Summons or Warrant for Offender Under Supervision filed with the Court on September 29, 2005 and February 28, 2006, and to submit to Judge Tinder proposed Findings of Facts and Recommendations for disposition under Title 18 U.S.C. §§3401(i) and 3583(e).

Proceedings were held on October 7, 2005 and March 2, 2006 in accordance with Rule 32.1 of the *Federal Rules of Criminal Procedure*. At the proceedings on October 7, 2005, Mr. Wheeler appeared in person with his appointed counsel, William Dazey, Office of the Indiana Federal Community Defender; the government appeared by Winfield Ong, Assistant United States Attorney; and U. S. Parole and Probation appeared by Dwight Wharton, U. S. Parole and Probation officer, who participated in the proceedings.

On October 7, 2005, the Court conducted the following procedures in accordance with Rule 32.1(a)(1) *Federal Rules of Criminal Procedure* and Title 18 U.S.C. §3583:

1. William Dazey, Office of Indiana Federal Community Defender, was present and appointed by the Court to represent Mr. Wheeler in regard to the pending Petition for Revocation of Supervised Release.

2. A copy of the Petition for Revocation of Supervised Release was provided to Mr. Wheeler and his counsel who informed the Court that they had read and understood the specification of violations and waived further reading thereof.

3. Mr. Wheeler was advised of his right to a preliminary hearing and its purpose in regard to the alleged specified violations of his supervised release contained in the pending Petition.

4. Mr. Wheeler would have a right to question witnesses against him at the preliminary hearing unless the Court, for good cause shown, found that justice did not require the appearance of a witness or witnesses.

5. Mr. Wheeler had the opportunity to appear at the preliminary hearing and present evidence on his own behalf.

6. If the preliminary hearing resulted in a finding of probable cause that Mr. Wheeler had violated an alleged condition or conditions of his supervised release set forth in the Petition, he would be held for a revocation hearing before the undersigned Magistrate Judge, in accordance with Judge Tinder's designation entered on October 4, 2005.

7. Mr. Dazey stated that Juarez Wheeler would stipulate there is a basis in fact to hold him on the specifications of violation of supervised release set forth in the Petition. Mr. Wheeler executed a written waiver of the preliminary examination, which was accepted by the Court.

8. Mr. Wheeler, by counsel, stipulated that he committed specifications of violations set forth in the Petition for Warrant or Summons for an Offender Under Supervision, filed with the Court on September 29, 2005 as follows:

<u>Violation Number</u>	<u>Nature of Noncompliance</u>
1	The defendant shall reside at the Volunteers of America Community Corrections Center for up to 90 days, and shall observe the rules of that facility.

On July 15, 2005, Mr. Wheeler's conditions were modified as stated above due to ongoing marijuana usage (please see petition dated July 13, 2005). He surrendered to Volunteers of America (VOA) on August 16, 2005, and subsequently secured employment. On September 11, 2005, an unknown individual called VOA and represented himself to be a supervisor from the defendant's employment. The fictitious individual requested Mr. Wheeler be allowed to leave the facility to work the normal procedures were followed and he was granted a pass for work purposes. On September 12, 2005, a follow-up call was made to the defendant's employer to confirm his work hours for the previous days. It was learned he did not work on the aforementioned date and no one from their company called to request his presence. Mr. Wheeler's whereabouts and activities were unknown for 12 hours on September 11, 2005. Following the gross violation of facility rules, the defendant was considered for termination from VOA's program. However, both the case manager and probation officer verbally reprimanded Mr. Wheeler for his deceptive conduct. He was told that future violations of facility rules would result in more punitive sanctions.

On September 16, and 23, 2005, the defendant failed to pay the required subsistence fee of 25% of his gross income. He also failed to submit his paystubs which are used to verify hours worked. Mr. Wheeler's employer was subsequently contacted to verify his work hours for the previous two-week period. When comparing his actual hours worked to his employment passes (travel time included), he was unaccounted for approximately 42.5 hours. When confronted about his discrepancy, the defendant admitting violating VOA's rules. Based on his second gross violation of facility rules, Mr. Wheeler was discharged as a program failure on September 26, 2005. Due to the nature of the violation, an expedited summons is requested.

The proceedings were then adjourned pending disposition, which proceedings were set for April 4, 2006.

On February 28, 2006, a Petition for Warrant or Summons for Offender Under Supervision was filed in this cause. On the same date, the Honorable John Daniel Tinder issued an Order, designated the undersigned United States Magistrate Judge to conduct hearings on this Petition on the defendant, and to submit to Judge Tinder proposed findings of fact and recommendations for disposition.

On March 2, 2006, the following proceedings were held:

1. The defendant appeared in person and with his court-appointed counsel, William Dazey.
2. A copy of the February 28, 2006 Petition for Revocation of Supervised Release was provided to Mr. Wheeler and his counsel who informed the Court that they had read and understood the specifications of each alleged violation and waived further reading thereof.
3. Mr. Wheeler was advised of his right to a preliminary hearing and its purpose in regard to the alleged specified violations of his supervised release contained in the pending Petitions.
2. Mr. Wheeler was informed he would have a right to question witnesses against him at the preliminary hearing unless the Court, for good cause shown, found that justice did not require the appearance of a witness or witnesses.
3. Mr. Wheeler was informed he had the opportunity to appear at the preliminary hearing and present evidence on his own behalf.
4. Mr. Wheeler was informed that if the preliminary hearing resulted in a finding of probable cause that Mr. Wheeler had violated the alleged condition or conditions of supervised release set forth in the Petitions, he would be held for a revocation hearing before the undersigned Magistrate Judge, in accordance with Judge Tinder's designation on February 28, 2006.

5. Mr. Wheeler stated his readiness to waive the preliminary hearing regarding the February 28, 2006 Petition under consideration. Mr. Wheeler then waived, in writing, the preliminary hearing and he was held to answer.

6. Mr. Dazey stated that Juarez Wheeler would stipulate there is a basis in fact to hold him on the specifications of violation of supervised release set forth in the Petition.

The parties stipulated the following in open Court:

(1) Mr. Wheeler and the government agreed they were ready to proceed to disposition on the pending Petitions to REVOKE Mr. Wheeler's supervised release in open Court this date.

(2) Mr. Wheeler admitted that he committed the violations of specifications set forth in the Petition to Revoke Supervised Release, filed with the Court on February 28, 2006, as follows:

<u>Violation Number</u>	<u>Nature of Noncompliance</u>
1	The defendant shall answer all inquiries by the probation officer and follow the instructions of the probation officer.
2	The defendant shall notify the probation officer within 72 hours of any change in residence or employment.

On January 9, 2006, Mr. Wheeler advised the probation officer he secured a job at a Speedway Gas Station earning \$7.00 per hour. He indicated he was in training and would provide further details (i.e. work scheduled, immediate supervisor) about said employment upon completion of training. On January 18, 2006, the probation officer made an unannounced employment visit and learned the defendant was terminated from the job on January 13, 2006, due to theft from an employee.

On January 19, 2006, Mr. Wheeler contacted the probation officer and indicated his employment ended with Speedway Gas Station on January 13, 2006. When asked to elaborate, he explained the

trainer(s) stated he was unable to keep an acceptable training pace so his employment was terminated.

On January 20, 2006, the probation officer interviewed the manager of the Speedway Gas Station and viewed store surveillance video dated January 9, 2006. The surveillance video shows the defendant taking unauthorized control over another employee's purse at 2:27 p.m. Specifically, he took the purse to a secured area for approximately two minutes before returning the purse to its original location. The owner of the purse was also interviewed and she indicated two of her credit cards were removed from her purse on January 9, 2006, and fraudulent charges were made with one of the cards that same date. On January 13, 2006, the manager confronted Mr. Wheeler about the theft allegation and showed him the surveillance video. The defendant denied taking contents of the employee's purse, and stated he was simply moving the purse to another location. He was then terminated for theft and law enforcement authorities were subsequently contacted.

Mr. Wheeler failed to advise the probation officer of his termination within 72 hours, and he was untruthful regarding the circumstances surrounding his termination.

3 The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.

On February 1, 2006, Detective David Lindsey, Marion County Sheriff's Department, left a voice message for the defendant to return his call. The following day, Mr. Wheeler contacted Detective Lindsey and made an appointment to be interviewed about the aforementioned theft and fraud allegations. A tentative interview was scheduled for February 7, 2006, between the detective and the defendant. On that date, Mr. Wheeler failed to show for the appointment and he was called again by Detective Lindsey. After explaining the importance of discussing the criminal allegations, the defendant said he refused to meet with the detective.

Mr. Wheeler failed to notify the probation officer he was questioned by a law enforcement officer on at least two separate occasions.

4 The defendant shall not commit another federal, state, or local crime.

On February 24, 2006, Mr. Wheeler was arrested by the Marion County Sheriff's Department and charged with two counts of Theft

and one count of Fraud, all class D felonies. The defendant made an initial appearance on the same date in Marion County Superior Court 18 under Case No. 49F180602DF025116. He was released on his own recognizance via conditional release, and a pretrial conference hearing is scheduled for March 17, 2006. Mr. Wheeler advised the probation officer about his arrest and subsequent release on February 27, 2006. When asked if he knew the nature of the allegations, he stated the Court did not present details of the charges during his initial hearing and he had no idea where, how, or why the fraud-related charges originated.

The Probable Cause Affidavit is consistent with the allegations reported above. In addition, the lead detective obtained a Wal Mart surveillance video dated January 9, 2006, at 7:24 p.m. The video shows the defendant's fraudulent use of the stole credit card in a \$165.42 purchase of numerous goods at Wal Mart.

(4) Mr. Wheeler has a relevant criminal history category of II. *See*, U.S.S.G. §7B1.4(a).

(5) The most serious grade of violation committed by Mr. Wheeler constitutes a Grade B violation, pursuant to U.S.S.G. §7B1.1(b).

(6) Pursuant to U.S.S.G. §7B1.4(a) upon revocation of supervised release the range of imprisonment applicable to Mr. Wheeler is 6 to 12 months.

(7) The parties agree that the appropriate disposition of the case would be revocation of Mr. Wheeler's supervised release and that he be sentenced to the custody of the Attorney General or his designee for a period of 8 months. Further, upon release from confinement, Mr. Wheeler will be subject to supervised release for two years.

The Magistrate Judge informed the defendant and the parties' respective counsel that the Magistrate Judge would accept the parties' stipulations.

7. The Court then placed Mr. Wheeler under oath and inquired directly of him whether he admitted committing violations of supervised release contained in the Petition. Mr. Wheeler admitted the violations.

The Court, having heard the admissions of the defendant, the stipulations of the parties, and the arguments and discussions on behalf of each party, **NOW FINDS** that the defendant, Juarez Wheeler, violated the above-delineated conditions in both Petitions.

Mr. Wheeler's supervised release is therefore **REVOKED** and he is sentenced to the custody of the Attorney General or his designee for a period of 8 months. The service of the sentence shall begin immediately. At the conclusion of Mr. Wheeler's term of confinement, he will be subject to supervised release for a period of two years.

Counsel for the parties and Mr. Wheeler stipulated in open Court waiver of the following:

1. Notice of the filing of the Magistrate Judge's Report and Recommendation;
2. Objection to the Report and Recommendation of the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §636(b)(1)(B); Rule 72.b, *Federal Rules of Civil Procedure*, and S.D.Ind.L.R.72.1(d)(2), *Local Rules of the U. S. District Court for the Southern District of Indiana*.

WHEREFORE, the U. S. Magistrate Judge **RECOMMENDS** the Court adopt the above report and recommendation revoking Mr. Wheeler's supervised release.

IT IS SO RECOMMENDED this 8th day of March, 2006.

Kennard P. Foster, Magistrate Judge
United States District Court

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